No. 90-1059

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

v.

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, AND ANGELO PETROMELIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

RICHARD M. COOPER
Counsel of Record
DAVID E. KENDALL
LAURENCE SHORE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, DC 20006
(202) 331-5000

WALTER J. JOSIAH, JR.
SIMON BARSKY
GAIL MARKELS
1133 Avenue of the Americas
New York, New York 10036
(212) 840-6161

Counsel for *Amicus Curiae*
Motion Picture Association
of America, Inc.

April 19, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. INTRODUCTION 7

II. FILMED ACCOUNTS OF "REAL LIFE CRIMES" HAVE CONSTITUTED A SUBSTANTIAL PART OF THE MOTION PICTURE INDUSTRY FROM ITS INCEPTION. 9

A. Early Films Relied on Criminals to Assist in Depicting Crimes and the Criminal Justice System. 9

B. Critically Acclaimed Films Of The Present Time Have Presented The Thoughts And Emotions Of Persons Who Have Committed Crimes, And Such Films Could Not Have Been Made Without Contractual Arrangements With Such Persons. . . . 18

1. The Effectiveness and Accuracy of GoodFellas as a

"Crime Film" Derives in Large Part from the Compensated Services of Henry Hill 18

2. Film-makers Who Advance Public Understanding of What Motivates Criminals Often Need Access to the Thoughts and Descriptions of Persons Directly Involved in Criminal Conduct 23

3. For Film Biographies Whose Subjects Have Committed a Crime, Payment to the Subject Has Often Been Necessary . . 29

C. Films Made with the Compensated Services of Persons Convicted of Crimes Are Part of the Self-Corrective Mechanism of the Communications Media. 32

III. "SON-OF-SAM" LAWS SERIOUSLY BURDEN THE PRODUCTION OF FILMS. 35

IV. NEW YORK'S "SON-OF-SAM" LAW VIOLATES THE FIRST AMENDMENT 37

CONCLUSION 45

TABLE OF AUTHORITIES

FEDERAL CASES

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) 39, 40

Cohen v. California, 403 U.S. 15 (1971) 39, 40

Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) 39, 40-41

De Jonge v. Oregon, 299 U.S. 353 (1937). 39

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 39

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). 16

Meyer v. Grant, 486 U.S. 414 (1988) 40

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 38

Riley v. National Federation of the Blind, Inc., 487 U.S. 781 (1988) . . . 17, 18

Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990) 7, 41-44

Terminiello v. Chicago, 337 U.S. 1 (1949) 40

Texas v. Johnson, 491 U.S. 397 (1989) 39

United States v. Eichman, ____ v. ____, 110 S. Ct. 2404 (1990) 39

STATE CASES

Barrett v. Wojtowicz, 94 Misc. 2d 379, 404 N.Y.S. 2d 829 (Sup. Ct. 1978), aff'd, 66 A.D. 2d 604, 414 N.Y.S. 2d 350 (1979) 28

Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989) 16

Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967) 29

STATE STATUTES

N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991) 1, 26

OTHER AUTHORITIES

A Cry in the Dark (Cannon Films, released by Warner Bros. 1988). . . . 32 - 34

And the Winner is . . . (in Britain), Boston Globe, Mar. 19, 1991, Living section, at 54 19

Andrews, Mobsters on a Carousel of Crime, Financial Times, Oct. 25, 1990, § 1, at 19 20

Arnold, Oscar Juggernaut, Washington Times, Feb. 14, 1991, § E, at 1 . . . 19

Associated Press, Tallahassee, Fla., Apr. 14, 1988 (Nexis, Omni File) . . . 27

Brownlow, Behind the Mask of Innocence 141-211 (1990) 9-14

Diliberto, A Violent Death, A Haunted Life, Time, Oct. 8, 1984, at 100 . . . 26

Dog Day Afternoon (Warner Bros. 1975) 27-28

Gelmis, The Power of the Media, Newsday, Nov. 6, 1988, § 2, at 4 . . . 32

GoodFellas (Warner Bros. 1990) 18, 19, 21, 22, 31

Guerrero, Scientific Penology Comes to Georgia, 6 Southern Exposure 42 (1978). 15

Halpern, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 Vand. L. Rev. 1199 (1986) 29

Hearst, Every Secret Thing (1982) . . . 29

Hevesi, Cases Under "Sam" Law: Notorious But Few, N.Y. Times, Feb. 20, 1991, § B at 44 8

I Am a Fugitive From A Chain Gang (Warner Bros. 1932) 14

Kael, Schoolboys, The New Yorker, Feb. 11, 1985, at 109 24

Kehr, GoodMovie, Chicago Tribune, Sept. 21, 1990, Friday Section, at C 20

L. A. Times, Aug. 23, 1989, § 1, at 2. 34

Lindsey, The Falcon and the Snowman (1979) 23

McNulty, The Burning Bed (1980) . . . 25

Mercy or Murder? (NBC 1984). 27

Newsday, Jan. 20, 1991, News Section, at 8 31

Newsweek, Aug. 24, 1987, at 48 22

O'Brien, Mob Saga on Target, Chicago Tribune, Oct. 24, 1990, Tempo Section, at 1 20

Regeneration (Fox 1915) 10

Simon, A Cry In The Dark, National Review, Dec. 9, 1988, at 59. 34

Singer, Predilections, The New Yorker, Feb. 6, 1989, at 38 17

Span, Patty Hearst, Choosing the Glare, Washington Post, Sept. 26, 1988, § C, at 1. 30

Sterritt, Patty Hearst Looks Back on a Bizarre Era, Christian Science Monitor, Sept. 22, 1988, at 22. 29-31

St. Petersburg Times, Apr. 15, 1988, Metro & State section, at 2B;

The Burning Bed (NBC 1984) 25, 26

The Falcon and the Snowman (Orion 1985) 23, 24

The Godfather's Hold on America, Washington Post, Dec. 30, 1990, § C, at 7 20

The Musketeers of Pig Alley (Biograph Co. 1912). 9, 10

The Oscar Plunge; And the Other Winners Were . . ., L.A. Times, Mar. 24, 1991, Calendar section, at 6 19

The Oscar Winners, N.Y. Times, Mar. 27, 1191, § C, at 20 19

The Passaic Textile Strike (Internat'l Workers Aid 1926) 12

The Prison Labor Problem in Georgia i (Report to the President of the United States) 15

The Shame of the Empire State (Ruby Feature Film Co. 1913) 11

The Thin Blue Line (Miramax 1988) . . . 9

AMICUS BRIEF IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Amicus curiae Motion Picture Association of America, Inc. ("MPAA") is a New York not-for-profit corporation that seeks to advance the interests of the American motion picture industry. MPAA's members[1/] are primarily engaged in the production and distribution of filmed entertainment, including theatrical motion pictures, television programs, and home videos.

New York's "Son-of-Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991) and similar laws in other jurisdic-

---

1/ Buena Vista Pictures Distribution, Inc.; Columbia Pictures Entertainment, Inc.; MGM/Pathe Communications Company; Orion Pictures Corporation; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios, Inc.; Warner Bros. Inc.

tions place significant and unjustified burdens on the MPAA's members and others who engage in film-making. These laws make it impossible or very difficult for film-makers to obtain the rights necessary to make films based on specific crimes from the persons accused or convicted of those crimes, or to obtain the assistance of such persons in the making of such films.

The "true crime story" film genre and the film biography in which depiction or discussion of crime is critical to the development of the subject's life have been mainstays of the movie industry from the silent era of the early twentieth century to the present time. Access to "criminal sources" crucial to the making of these films generally requires financial compensation.

Film-makers face the same chilling effect from the "Son-of-Sam" law as do book publishers such as Simon & Schuster. Because screenplays of many crime/biography movies are based on books, the link between book publishers and film-makers is especially close. Thus, the MPAA's members have a strong, direct interest in the petitioner's effort to protect its First Amendment rights against the constraints imposed by the "Son-of-Sam" law.

Both petitioner and respondents have consented to the filing of this brief. Their letters of consent[2/] are filed herewith.

[2/] Letter from Charles S. Sims to Richard M. Cooper (Mar. 7, 1991); Letter from Robert Abrams to Richard M. Cooper (Mar. 19, 1991).

SUMMARY OF ARGUMENT

New York's "Son-of-Sam" law cannot be sustained unless it passes the strict scrutiny test. The law fails this test: no compelling state interest justifies the restraints imposed by the law upon the making of films and other expressive works.

Filmed accounts of "real life crimes" have constituted a substantial part of the motion picture industry from its inception. Significant silent era films featured the "criminals" themselves, who presumably were paid for their efforts. Non-gangster crime films and biographies in which political figures and issues of political corruption were depicted also drew considerable attention during the silent era. Important social protest films of both the silent

and early modern eras of film-making also depicted real-life crimes in which the real-life criminals received compensation for the information and guidance they provided to the film-maker.

Critically acclaimed films of the present time have presented the thoughts and emotions of persons who have committed crimes. Such films could not have been made without contractual arrangements with such "criminals."

To make biographical films in which the subjects have committed a crime, payment to the "criminals" has often been necessary. Indeed, theatrical and television films generally cannot tell certain stories in which biography and criminal activity intersect unless payments are made.

Films made with the compensated services of persons convicted of crimes are also part of the mechanism by which the communications media correct their own excesses.

The burdens that "Son-of-Sam" laws currently impose on film studios may deter them from undertaking certain types of projects, and may lead to bowdlerization or fictionalization.

New York's "Son-of-Sam" law and "Son-of-Sam" laws in other jurisdictions cut film-makers off from sources who may be crucial for certain types of projects. Although repugnance at payments to such sources is understandable, the First Amendment protects freedom of speech from restraints based on such repugnance. Finally, there is no compelling need for "Son-of-Sam" laws, as distinct from laws

not targeted specifically at speech, to help victims of crime to recover compensation from perpetrators of crime.

ARGUMENT

I. INTRODUCTION

The court of appeals correctly recognized that New York's "Son-of-Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990), directly burdens speech and singles it out for differential treatment based on its expressive content. Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781-82 (2d Cir. 1990). Therefore, as the court also recognized, the statute cannot be sustained unless it "serve[s] a compelling state interest and . . . is narrowly drawn to achieve that end." Id. at 782 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

The discussion that follows demonstrates that films have made important contributions to public discussion of crime and other issues. Many of the films discussed were made possible only by payments that would have been within the scope of a "Son-of-Sam" law. Such laws currently restrain the making of socially beneficial films, and the loss of such films is not outweighed by any contribution by such laws to the advancement of compelling state interests. Therefore, as applied to films (as well as other types of expressive works), these laws violate the First Amendment.

II. FILMED ACCOUNTS OF "REAL LIFE CRIMES" HAVE CONSTITUTED A SUBSTANTIAL PART OF THE MOTION PICTURE INDUSTRY FROM ITS INCEPTION.

A. Early Films Relied on Criminals to Assist in Depicting Crimes and the Criminal Justice System.

In the silent era, pioneer filmmakers frequently strove to make realistic films about crimes and criminals. Film historian Kevin Brownlow has painstakingly demonstrated the large number of silent era films that in some fashion incorporated true crime stories.[3/] Some films "featured the very people at the storm center of controversy,"[4/] who presumably were paid for their efforts.

For example, in 1912 the renowned director D.W. Griffith made The

---

[3/] K. Brownlow, Behind the Mask of Innocence 141-211 (1990) [hereinafter cited as "Brownlow"].

[4/] Id. at xxi, 152.

Musketeers of Pig Alley (Biograph Co. 1912), which was intended to show "vividly the doings of the gangster type of people," and in which "real gangsters" took part.[5/] In 1915 appeared Regeneration (Fox 1915), based on the autobiography of Owen Kildare, a Bowery gang leader of the 1890s.[6/] Kildare and others had sold the rights to his life story to film producer William Fox. The film reveals Kildare's life of crime and subsequent rehabilitation, and is remarkable for its searching examination of the impact of environment on the formation of a criminal's mind.[7/] In 1916, Regeneration was

---

[5/] Id. at 184.

[6/] Id. at 189-95. See also C. Clarens, Crime Movies: From Griffith to the Godfather and Beyond 21 (1980) [hereinafter cited as "Clarens"].

[7/] Brownlow at 193-94.

selected by Moving Picture World as one of the three great American films, together with Griffith's Birth of a Nation and Ince's Wrath of the Gods.[8/]

Non-gangster crime films and biographies in which political figures and issues of political corruption were depicted also drew considerable attention during the silent era. Governor William Sulzer of New York was impeached, convicted, and removed from office in 1913 as a result of a political war with Tammany Hall.[9/] Later that year he apparently was paid to play the lead in The Shame of the Empire State (Ruby Feature Film Co. 1913), a motion picture about his unsuccessful political struggle.[10/]

[8/] Id. at 189-95.

[9/] Id. at 219-23.

[10/] Id.

Had the film included any criminal conduct by Sulzer at any stage of his life, a "Son-of-Sam" law like New York's would have applied.

Another significant American social protest film of the 1920s, The Passaic Textile Strike (Internat'l Workers Aid 1926), was a depiction of real life "criminal conduct." This film contained newsreel footage and reconstructions of the actual strike events, including violence and intervention by the police; and the film itself soon became the principal source of relief funds for unemployed strikers.[11/] From Brownlow's account, it appears that a number of the strikers appeared in the reconstructed scenes, and thus a "Son-of-Sam" law like New York's would have applied. The point is that an

---

[11/] Id. at 498-508.

early American film of political and social importance focused on illegal activity and provided the participants in such activity with compensation for their cooperation, without which the film either could not have been made or, at the very least, would have been made very differently.

During the early stages of the modern era of film-making, another important social protest film also depicted a real-life crime story in which the real-life criminal received compensation for the information and guidance he provided to the film-maker. Robert Elliot Burns was a World War I veteran who had been falsely convicted of a crime and sentenced to hard labor in a Georgia penal institution.[12/] After several months

---

[12/] Clarens at 108-10.

on a chain gang, Burns escaped and became a successful writer in Chicago. Seven years later, he voluntarily returned to Georgia with the assurance of a full pardon. The State broke its promise; Burns served another full year on a chain gang, escaped again, and wrote an account of the criminal justice system. He was living in hiding in New Jersey in 1932, when producer Darryl F. Zanuck and Warner Bros. acquired the film rights to Burns's memoir of his ordeal, and asked him to serve as a technical advisor for the film adaptation. Burns went to Hollywood and worked on the screenplay of I Am a Fugitive From a Chain Gang (Warner Bros. 1932), which was voted Best Picture of the year by the National Board of Review.[13/] After the release of the film,

---

[13/] Id.

New Jersey's governor refused to extradite Burns to Georgia. The film's portrayal of the horrors of chain-gang prison labor helped bring about the abolition of the Georgia chain-gang system in 1937.[14/]

Thus, Zanuck and Warner Bros. continued the silent era practice of filming a real-life crime story as part of a "criminal's" biography, and using the criminal's compensated services in making the film. The social contribution of I Am a Fugitive From a Chain Gang is obvious, and was perhaps one reason why the Court later declared:

[14/] Id. See also The Prison Industries Reorganization Administration, The Prison Labor Problem in Georgia i (1937) (Report to the President of the United States); G. Guerrero, Scientific Penology Comes to Georgia, 6 Southern Exposure 42 (1978).

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (footnote omitted).[15/]

[15/] The Court's observation in Joseph Burstyn and the experiences of Robert E. Burns with a flawed criminal justice system in I Am a Fugitive From a Chain Gang have a particular resonance in the recent success of documentary film-maker Errol Morris's The Thin Blue Line (Miramax 1988). This film depicts the first degree murder conviction in Texas of Randall Adams, who was sentenced to death. As a direct consequence of The Thin Blue Line, the conviction of Adams -- interviewed at length in the film -- was overturned, and his freedom was restored. On the overturning of the conviction, see Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989). As Morris immodestly but accurately asserts, The Thin

(continued...)

The "Son-of-Sam" law and similar laws in other jurisdictions today threaten to diminish the effectiveness of motion pictures as an organ of public opinion by closing off access to sources long-established as crucial to the filmmaker's understanding of, e.g., the role of social conditions in contributing to the commission of a crime or to the unjust conviction of a criminal defendant. Payments to such sources, an established practice from the beginning of the film industry, are but further reflections of the accuracy of Justice Scalia's observation that "[c]ompensatory employment is, I would judge, the natural order of things." Riley v. National Federation of

---

[15/](...continued)
Blue Line "is the first murder mystery that actually solves a murder." See Singer, Predilections, The New Yorker, Feb. 6, 1989, at 38.

the Blind, Inc., 487 U.S. 781, 804 (1988).

B. Critically Acclaimed Films Of The Present Time Have Presented The Thoughts And Emotions Of Persons Who Have Committed Crimes, And Such Films Could Not Have Been Made Without Contractual Arrangements With Such Persons.

1. The Effectiveness and Accuracy of GoodFellas as a "Crime Film" Derives in Large Part from the Compensated Services of Henry Hill.

More than a half-century after I Am a Fugitive From a Chain Gang, Warner Bros. achieved another artistic triumph by producing a film based on a criminal's memoir, and in which the criminal himself played an important consulting role. This time, however, social protest was not the theme; the award-winning GoodFellas (Warner Bros. 1990) is an exploration of the social misfits who serve, eagerly, as the foot soldiers of

organized crime.[16/] Critics have noted that GoodFellas, by virtue of a solid foundation in the true, squalid facts of criminal life, provides an important corrective to earlier, romantic views of underworld activities and actors, some of

---

[16/] GoodFellas was nominated for six Academy Awards, including best picture and best adapted screenplay. See Arnold, Oscar Juggernaut?, Washington Times, Feb. 14, 1991, § E, at 1. It won one Academy Award, for best supporting actor. The Oscar Winners, N.Y. Times, Mar. 27, 1991, § C, at 20. GoodFellas won the best picture and best director awards given by the Los Angeles Film Critics Association, the New York Film Critics Association, and the National Society of Film Critics. The Oscar Plunge; And the Other Winners Were . . ., L.A. Times, Mar. 24, 1991, Calendar section, at 6. It was also nominated for the Writers Guild of America Award for Best Screenplay Based on Material from Another Medium. United Press International, Feb. 19, 1991. GoodFellas won the best film, best director, and best adapted screenplay awards given by the British Academy of Film and Television Arts. Blowen, And the Winner is . . . (in Britain), Boston Globe, Mar. 19, 1991, Living section, at 54.

which had their origins in novels or other fictional works.[17] One reviewer asked: "Has any movie better captured the famed banality of evil?"[18] Not only professional film critics have hailed the accuracy of "GoodFellas"; law enforcement officers who have spent years fighting organized crime aver that the film faithfully captures "the crazy nonsense of how (mobsters) act and treat each other."[19] In the words of one homicide detective, watching "'GoodFellas' was like watching a story about people I knew."[20]

Of course, the verisimilitude that gives GoodFellas its power and evocativeness comes from the screenplay adaptation of Wiseguy, commissioned and published by the petitioner. Wiseguy -- and therefore GoodFellas -- was made possible only by the participation of Henry Hill, who admitted the commission of certain crimes that he related to author Nicholas Pileggi. See Joint Appendix at 26-27 (Affidavit of Pileggi). Hill demanded financial compensation for his cooperation with Pileggi. Moreover, Hill retained, with Pileggi, joint rights to any film adaptation of Wiseguy. When director Martin Scorsese and Warner Bros.

17/ Will, The Godfather's Hold on America, Washington Post, Dec. 30, 1990, § C, at 7. See also O'Brien, Mob Saga on Target, Chicago Tribune, Oct. 24, 1990, Tempo Section, at 1; Kehr, GoodMovie, Chicago Tribune, Sept. 21, 1990, Friday Section, at C.

18/ Andrews, Mobsters on a Carousel of Crime, Financial Times, Oct. 25, 1990, § 1, at 19.

19/ O'Brien, Mob Saga on Target, Chicago Tribune, Oct. 24, 1990, Tempo Section, at 1.

20/ Id.

acquired the film rights,[21] Hill had a contractual right to payment. There is no doubt that GoodFellas could not have been made without Henry Hill, and that Hill would not have participated without the assurance of compensation. Hill, in effect, was a joint author of a best-selling exposé of mob life.

Indeed, Warner Bros. hired Hill as a consultant in order to ensure that GoodFellas would preserve the realism of Wiseguy. The leading actors in the film sought advice from Hill about how they should play their roles. Robert de Niro, in particular, consulted frequently with Hill so that he could convey the realities of mob life.

---

[21] The price for the film rights was reported to be $550,000. See Newsweek, Aug. 24, 1987, at 48.

2. Film-makers Who Advance Public Understanding of What Motivates Criminals Often Need Access to the Thoughts and Descriptions of Persons Directly Involved in Criminal Conduct.

The Falcon and the Snowman (Orion 1985) is the true story of two young American men, Daulton Lee and Christopher Boyce, who became Soviet spies in the mid-nineteen seventies. They were arrested in January of 1977, and later convicted. The film is based on a reporter's factual account of their criminal spying activities.[22]

Director John Schlesinger attempted, however, to do much more in the film than merely provide a chronicle of their crimes. In Schlesinger's words, "It's not so much what they did as why

---

[22] R. Lindsey, The Falcon and the Snowman (1979).

that interests me. Without condoning their actions, we explore what was going on in their heads -- and in the world around them -- in the early seventies."[23/] To explore motive, to go beyond the news accounts that constitute the public's quotidian diet of crime, Schlesinger needed access to the minds of Lee and Boyce, and for access payment was necessary.

Film-makers' and authors' access to the thoughts and emotions of accused or convicted criminals has led to increased public understanding of the circumstances in which certain types of crimes occur, and to changes in the public view of such crimes. The effectiveness of films on such subjects in at-

---

[23/] Kael, Schoolboys, The New Yorker, Feb. 11, 1985, at 109 (emphasis in the original).

tracting public attention and stimulating public discussion is increased when they depict not abstractions but the facts of specific real-life cases.

For example, the "battered wife" syndrome has come to be recognized as a significant social phenomenon. That recognition has resulted, in substantial part, from a television film based on a book, itself based on the author's access to the psyche of a battered wife who retaliated by killing her husband. In 1977, Francine Hughes, who had been brutally abused by her husband, was charged with murdering him by setting him on fire. In the same year, she was acquitted of murder by reason of temporary insanity. See F. McNulty, The Burning Bed (1980). In 1984 appeared the television film The Burning Bed (NBC 1984), in

which the actress Farrah Fawcett portrayed Hughes. The film helped to publicize the "battered wife" syndrome, and stimulated widespread public debate, from which legislators and the courts have gained increased understanding of the circumstances of these "perpetrators." Hughes received $11,000 in connection with the book by McNulty, and an additional $8,000 in connection with the television film.[24/]

A similar development has occurred with respect to "mercy killers."

[24/] Diliberto, A Violent Death, A Haunted Life, Time, Oct. 8, 1984, at 100.

The fact that Hughes was acquitted by reason of temporary insanity would not have placed her film and book payments outside the sweep of New York's "Son-of-Sam" law. N.Y. Exec. Law § 632-a.5 provides that "a person found not guilty as a result of the defense of mental disease or defect . . . shall be deemed to be a convicted person."

Roswell Gilbert was convicted of murdering his wife, who suffered from Alzheimer's disease. Mercy or Murder? (NBC 1984), a film portraying his case,[25/] has contributed to increased public discussion of, and perhaps to some evolution in public attitudes toward, this class of crimes. The film could not have been as effective as it was without payment to Gilbert.

Films that rely on assistance from persons accused or convicted of crimes to depict realistically more common types of crime also contribute to public understanding of contemporary social realities. In the critically acclaimed Dog Day Afternoon (Warner Bros.

[25/] See St. Petersburg Times, Apr. 15, 1988, Metro & State section, at 2B; Associated Press, Tallahassee, Fla., Apr. 14, 1988 (Nexis, Omni File).

1975), winner of the Academy Award for best screenplay, director Sidney Lumet portrayed the true story of a Brooklyn bank robbery. The key source for the film was the robber, John Wojtowicz, whose earnings from Warner Bros. were paid to the New York Crime Victims Board.[26] The film is certainly not a celebration of crime or violence; rather, it examines how environmental and personal pressures converged to make Wojtowicz desperate.

---

[26] Because New York's "Son-of-Sam" law was not enacted until 1977, it did not affect the making of Dog Day Afternoon (1975). However, after the law was enacted, Warner International Corporation, the producer of the film, paid to the Crime Victim's Compensation Board approximately $43,000 that otherwise would have been paid to Wojtowicz. See Barrett v. Wojtowicz, 94 Misc. 2d 379, 404 N.Y.S.2d 829 (Sup. Ct. 1978), aff'd, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979).

3. For Film Biographies Whose Subjects Have Committed a Crime, Payment to the Subject Has Often Been Necessary.

Film-makers generally need to obtain releases from real-life "criminals" in order to make biographical films.[27] The 1988 film Patty Hearst (Atlantic Entertainment Group-Zenith 1988) is based on Hearst's own account of her 1974 abduction by, and subsequent aid to the criminal activities of, the Symbionese Liberation Army.[28] Hearst's bizarre experiences raise issues that, as film critic David Sterritt has noted, still divide Americans: Did Hearst vol-

---

[27] See generally Halpern, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 Vand. L. Rev. 1199 (1986). And cf., e.g., Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967).

[28] Hearst, Every Secret Thing (1982).

untarily become a criminal, or was she actually a victim of brainwashing? Did she go to jail justifiably, or was she unfairly punished because she was a child of wealth and privilege?[29] For the film Patty Hearst to be made, and for these questions to be answered, film rights had to be acquired, and payment to Hearst had to be made.[30] The issues that the film examines, however, help the public achieve much more than an opinion about Hearst alone. As Sterritt concludes, the film "isn't the story of one woman; it's the biography of an age -- an age that's gone, at least for now, and may never

---

[29] Sterritt, Patty Hearst Looks Back on a Bizarre Era, Christian Science Monitor, Sept, 22, 1988, at 22.

[30] On acquisition of the film rights and payment to Hearst, see Span, Patty Hearst, Choosing the Glare, Washington Post, Sept. 26, 1988, § C, at 1.

return if we remember its lessons vividly enough."[31]

GoodFellas, Patty Hearst, and similar films point to a central fact of making film biographies based on books: to make the film, the subject/author must be paid. Shares of film rights often are determined before any producer contemplates making a film of the subject. Thus, for the counsel to the N.Y. Crime Victims Board to assert that "[w]e are not aware of any story that is not being told because someone was not guaranteed a profit,"[32] is to ignore that an important medium of communication -- theatrical and television films -- cannot tell certain stories in which biography and criminal

---

[31] Sterritt, supra n.29, at 22.

[32] Newsday, Jan. 20, 1991, News Section, at 8.

activity intersect unless payments are made.

C. Films Made with the Compensated Services of Persons Convicted of Crimes Are Part of the Self-Corrective Mechanism of the Communications Media.

In A Cry in the Dark (Cannon Films, released by Warner Bros. 1988), director Fred Schepisi re-examined a sensational Australian criminal case,[33] the trial of Lindy Chamberlain, accused of, convicted for, and eventually pardoned (on the eve of the film's release) in, the death of her infant daughter. Schepisi viewed his task as making a film "that would be true to the life of a real woman, while also showing how that life was distorted in the news media."[34] A

[33] Had the case occurred in New York, the "Son-of-Sam" law would have applied.

[34] Gelmis, The Power of the Media, Newsday, Nov. 6, 1988, § 2, at 4.

Cry in the Dark was, for Schepisi, "a cautionary tale for our time about the media": a woman was wrongfully convicted of murder largely because the media perceived and portrayed her as cold-blooded, as someone who did not behave in a manner befitting a grieving mother.[35] Schepisi's point was that the image became the "truth." To expose the media's lie, he had to get inside the private lives of the accused: "We spent time getting to know the Chamberlains, so the film is about the public perception and the private reality -- and how that differs."[36] The time taken by the Chamberlains[37] to cooperate in this process was

[35] Id.

[36] Id.

[37] Lindy Chamberlain's husband, Michael Chamberlain, was convicted of being an (continued...)

compensated.[38] The result is a work that, in critic John Simon's words, portrays "honest but horrible human stupidity with unsurpassable sharpness," and is "one of the most transcendent religious films since 'Monsieur Vincent' and 'God Needs Men.'"[39]

"True crime films," then, can contribute something much more than mere media exploitation of morbid public interest in human tragedy. Such films can expose, and in fact have exposed, that

---

[37] (...continued)
accessory after the fact, but was given a suspended sentence in order to care for the couple's remaining children. Like his wife, he was eventually pardoned. Simon, A Cry In The Dark, National Review, Dec. 9, 1988, at 59.

[38] L.A. Times, Aug. 23, 1989, § 1, at 2.

[39] Id.

morbid interest and the role the media play in encouraging it.

III. "SON-OF-SAM" LAWS SERIOUSLY BURDEN THE PRODUCTION OF FILMS.

Finally, the burdens that "Son-of-Sam" laws currently impose on film studios may deter them from undertaking certain types of projects, and may lead to bowdlerization or fictionalization. The following discussion summarizes the experience of one major studio.

"Son-of-Sam" laws have prevented this studio from presenting some stories of crimes from the perspective of the persons who committed them. Such persons will not provide source material or information without compensation; and, by putting that compensation beyond reach for several years, "Son-of-Sam" laws destroy their willingness to cooperate. A film-maker who wants to present the expe-

rience and outlook of the person who knows better than anyone else how and why the crime was committed is left with the unsatisfactory recourse of telling a different story, using a different approach, or resorting to fiction. These laws have thereby distorted and truncated the content of films.

The costs of analyzing the application of "Son-of-Sam" laws to particular projects, and of complying with such laws, have led the studio to abandon or defer some projects. To make a filmed biography, a studio must have rights to the subject's life story. If the subject has committed a crime, the purchase of such rights may implicate a "Son-of-Sam" law. This studio has incurred large legal and investigatory fees in efforts to determine whether such a law applies;

and, if it does, how to comply. Compliance becomes exceedingly complicated and expensive when different states' "Son-of-Sam" laws may apply because the subject committed crimes in more than one jurisdiction.

Thus, even as the Court considers the present case, the "Son-of-Sam" laws are operating to reduce the flow of ideas and information to the public.

IV. NEW YORK'S "SON-OF-SAM" LAW VIOLATES THE FIRST AMENDMENT.

The foregoing discussion demonstrates that films whose production involves payments subject to "Son-of-Sam" laws can increase and make more vivid public discussion and understanding of important matters and issues of public interest. Moreover, where excesses occur in the press's treatment of crimes and

criminals, films, like other media of communication, can play a significant role in the self-correction of the media. Films thus contribute to the robust public debate contemplated in, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The foregoing discussion also shows that "Son-of-Sam" laws diminish the capacity of films (and other works) to make that contribution because such laws cut film-makers off from sources who may be crucial for certain types of projects. They also impose heavy burdens on film-makers, and such burdens may lead to abandonment, bowdlerization, or distortion of proposed films. Such effects are a significant loss to free expression.

Repugnance at payments to criminals for discussing their crimes is an

understandable visceral human reaction. The First Amendment, however, protects freedom of speech from restraints based on such reactions. See, e.g., United States v. Eichman, _____ U.S. _____, 110 S. Ct. 2404, 2409-10 (1990); Texas v. Johnson, 491 U.S. 397, 414 (1989); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Cohen v. California, 403 U.S. 15, 25-26 (1971); De Jonge v. Oregon, 299 U.S. 353 (1937); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327-28 (7th Cir. 1985) (anti-pornography ordinance), aff'd, 475 U.S. 1001 (1986); Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir.) (march of American Nazis through community with large Jewish population), cert. denied, 439 U.S. 916 (1978). Public or governmental opposition to financial compensation of a

party for assisting in producing a film containing protected speech cannot justify a restraint on such compensation. Cf. Meyer v. Grant, 486 U.S. 414, 422-24 (1988).

A statutory purpose to "satisf[y] victims' sense of justice and desire for retribution," as suggested by the court of appeals, 916 F.2d at 783, also cannot justify imposition of substantial burdens on speech. The fact that non-speakers may become aware of speech and may feel harmed or offended by it and may want very much that it be suppressed and that the speaker suffer harm is not a basis for suppressing speech. See, e.g., Cohen v. California, 403 U.S. at 25-26; Terminiello v. Chicago, 337 U.S. 1, 4 (1949); American Booksellers Ass'n v. Hudnut, 771 F.2d at 327-28; Collin v.

Smith, 578 F.2d at 1205-06. To the extent this formulation asserts a state interest in greater punishment of criminals, it can be satisfied by means that, in contrast to the "Son-of-Sam" law, do not (i) apply prior to conviction or in the absence of any conviction, (ii) apply even after a term of imprisonment has been served and the criminal's liberty has been restored, and (iii) burden exclusively payments by the communications media for otherwise constitutionally protected speech. There is no compelling interest in satisfying victims' sense of justice and desire for retribution by means of the peculiar mechanism of "Son-of-Sam" laws.

The court of appeals asserts that "Son-of-Sam" laws "increase[] the criminal's awareness of the consequences of

his crime." 916 F.2d at 783. The court cites no evidence in support of that assertion. The magnitude of any such effect is surely small. Moreover, in view of the broad array of punishments available to state legislatures and the many means available to remind criminals of the consequences of their offenses (e.g., extended probation, civil liability), there is no compelling need for "Son-of-Sam" laws to perform that function.

Finally, there is no compelling need for "Son-of-Sam" laws, as distinct from laws not targeted specifically at speech, to help victims of crime to recover compensation from perpetrators of crime. The court of appeals asserts:

> A great societal interest is served . . . in barring criminals from profiting at the expense of victims who are in need of compensation and press their demands for restitution. Our society rightly deems it

> fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

Id. at 782. "Son-of-Sam" laws are not needed to serve that "great societal interest." Even without such laws, a criminal who is paid for his story can be sued by his victim(s); and, if appropriate, his assets can be attached. To secure compensation from the assets of criminals, victims can rely on the remedies, including attachment, available to civil plaintiffs generally. If there are gaps in those remedies, they can be filled by legislation not targeted exclusively at funds derived from certain types of speech.[40/] Indeed, from the perspective

---

[40/] If, as the court of appeals suggests, 916 F.2d at 783, New York's attachment law provides inadequate protection to (continued...)

of victim compensation, "Son-of-Sam" laws are likely to have the perverse effect of preventing criminals from obtaining substantial funds from which victims could seek compensation.[41/]

[40/](...continued)
a crime victim suing a criminal, the attachment law can be amended to give such a plaintiff greater protection with respect to all of a criminal's assets, not merely those within the scope of the "Son-of-Sam" law. With respect to victim compensation, the line drawn between (i) assets subject to the "Son-of-Sam" law and (ii) other assets is irrational.

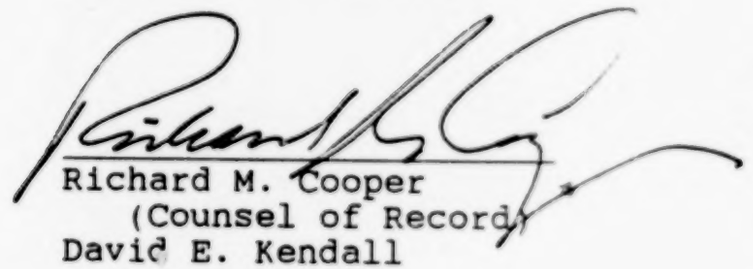
[41/] The New York Crime Victims Board has unwittingly undercut its own case by noting that compensation to crime victims in "Son-of-Sam" cases is "small-time stuff" compared to amounts distributed to crime victims not involved in "Son-of-Sam" cases. See Hevesi, Cases Under "Sam" Law: Notorious But Few, N.Y. Times, Feb. 20, 1991, § B, at 8. The apparent reason is the effectiveness of other means of redress provided by New York for crime victims, together with the probability that the principal effect of the "Son-of-Sam" law is to prevent book publishers, film-makers, and others from
(continued...)

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed, and this Court should hold that New York's "Son-of-Sam" law violates the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

WILLIAMS & CONNOLLY



Richard M. Cooper
(Counsel of Record)
David E. Kendall
Laurence Shore

[41/](...continued)
making payments to criminals that would be subject to that law. The Board's counsel has further acknowledged that the victims of the notorious Son of Sam himself, David Berkowitz, to whom the "Son-of-Sam" law did not apply, eventually received the same monies they would have received had the statute been applicable. See id.

839 17th Street, N.W.
Washington, DC 20006
(202) 331-5000

Walter J. Josiah, Jr.
Simon Barsky
Gail Markels

1133 Avenue of the Americas
New York, New York 10036
(212) 840-6161

Counsel for *Amicus Curiae*
Motion Picture Association
of America, Inc.

April 19, 1991